

STATE OF SOUTH CAROLINA

(Caption of Case)

In Re: Friends of the Earth and Sierra Club,
Complainants/ Petitioners,

v.

South Carolina Electric & Gas Co.,
Defendant / Respondent.BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

COVER SHEET

DOCKET

NUMBER: 2017 - 207 - E

(Please type or print)

Submitted by: Robert Guild

SC Bar Number: 2358

Address: 314 Pall Mall Street

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Columbia, SC 29201

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Other:

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NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use by the Public Service Commission of South Carolina for the purpose of docketing and must be filled out completely.

DOCKETING INFORMATION (Check all that apply)

☐ Emergency Relief demanded in petition☒ Request for item to be placed on Commission's Agenda expeditiously☐ Other:

INDUSTRY (Check one)	NATURE OF ACTION (Check all that apply)		
<input checked="" type="checkbox"/> Electric	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Letter	<input type="checkbox"/> Request
<input type="checkbox"/> Electric/Gas	<input type="checkbox"/> Agreement	<input type="checkbox"/> Memorandum	<input type="checkbox"/> Request for Certification
<input type="checkbox"/> Electric/Telecommunications	<input type="checkbox"/> Answer	<input checked="" type="checkbox"/> Motion	<input type="checkbox"/> Request for Investigation
<input type="checkbox"/> Electric/Water	<input type="checkbox"/> Appellate Review	<input type="checkbox"/> Objection	<input type="checkbox"/> Resale Agreement
<input type="checkbox"/> Electric/Water/Telecom.	<input type="checkbox"/> Application	<input type="checkbox"/> Petition	<input type="checkbox"/> Resale Amendment
<input type="checkbox"/> Electric/Water/Sewer	<input type="checkbox"/> Brief	<input type="checkbox"/> Petition for Reconsideration	<input type="checkbox"/> Reservation Letter
<input type="checkbox"/> Gas	<input type="checkbox"/> Certificate	<input type="checkbox"/> Petition for Rulemaking	<input type="checkbox"/> Response
<input type="checkbox"/> Railroad	<input type="checkbox"/> Comments	<input type="checkbox"/> Petition for Rule to Show Cause	<input type="checkbox"/> Response to Discovery
<input type="checkbox"/> Sewer	<input type="checkbox"/> Complaint	<input type="checkbox"/> Petition to Intervene	<input type="checkbox"/> Return to Petition
<input type="checkbox"/> Telecommunications	<input type="checkbox"/> Consent Order	<input type="checkbox"/> Petition to Intervene Out of Time	<input type="checkbox"/> Stipulation
<input type="checkbox"/> Transportation	<input type="checkbox"/> Discovery	<input type="checkbox"/> Prefiled Testimony	<input type="checkbox"/> Subpoena
<input type="checkbox"/> Water	<input type="checkbox"/> Exhibit	<input type="checkbox"/> Promotion	<input type="checkbox"/> Tariff
<input type="checkbox"/> Water/Sewer	<input type="checkbox"/> Expedited Consideration	<input type="checkbox"/> Proposed Order	<input type="checkbox"/> Other: _____
<input type="checkbox"/> Administrative Matter	<input type="checkbox"/> Interconnection Agreement	<input type="checkbox"/> Protest	
<input type="checkbox"/> Other: _____	<input type="checkbox"/> Interconnection Amendment	<input type="checkbox"/> Publisher's Affidavit	
	<input type="checkbox"/> Late-Filed Exhibit	<input type="checkbox"/> Report	

Print Form

Reset Form

ROBERT GUILD

Attorney at Law

314 Pall Mall • Columbia, South Carolina 29201 • 803-252-1419 • bguild@mindspring.com

April 10, 2018

Ms. Jocelyn D. Boyd
Chief Clerk & Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

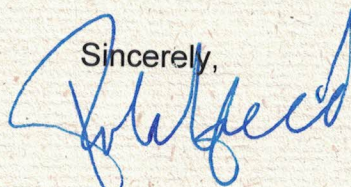
In Re: Friends of the Earth and Sierra Club v. SCE&G,
Docket No. 2017-207--E

Dear Ms. Boyd:

Enclosed please find Complainants' Second Motion to Compel Discovery, for consideration in this proceeding and the related dockets with which this matter has been consolidated. I certify that I am, this day, filing and serving the parties with this Motion electronically.

With kind regards I am

Sincerely,



Robert Guild

Encl.s

CC: K. Chad Burgess, Esquire
All Parties



BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2017-207-E

In Re: Friends of the Earth and Sierra Club,)	
Complainants/ Petitioners,)	
)	
v.)	
)	
South Carolina Electric & Gas Co.,)	
Defendant / Respondent.)	

COMPLAINANTS' SECOND MOTION TO COMPEL DISCOVERY

Respondent SCE&G's latest discovery Responses and Objections, dated April 4, 2018, now make clear that it is refusing and obstructing virtually all legitimate discovery by Complainants, essential to a fair and effective determination of the complex and significant claims and defenses pending before the Commission in this and the related consolidated dockets. Despite undersigned counsel's best good -faith efforts to resolve outstanding discovery disputes with Respondent, as urged by the Hearing Officer, SCE&G has ceased producing any further responsive documents pursuant to Complainants' First and Second Discovery and has now categorically refused to produce any documents- except those already provided to ORS and other parties- asserting for the first time objections and spurious conditions to the production of any and all requested document discovery. See, Defendant/Respondent's

Responses and Objections to Complainants' Third Interrogatories, Document Production Requests and Request for Entry, Exhibit 1, hereto.

Pursuant to R. 103-833 and R. 103-835 of the Commission's Rules, Rules 26 and 37 of the South Carolina Rules of Civil Procedure and the Commission's Orders No. 2017-637, dated October 4, 2017, No. 2017-691, dated November 1, 2017, and No. 2017-770, dated December 20, 2017, the Complainants, Friends of the Earth and Sierra Club, hereby move the Commission for an order compelling South Carolina Electric & Gas Co..(SCE&G), to fully respond, without further delay, to all outstanding discovery requests sought by Complainants by providing all responsive documents and other records as specifically requested, organized in a reasonably accessible format and properly indexed to the specific subject document request. Complainants renew the pending Motion to Compel Discovery, filed December 22, 2017, urge the Commission to reject the spurious and dilatory objections asserted by SCE&G to virtually every discovery request made, claiming vagueness, overbreadth, irrelevance, confidentiality or privilege. In order to effectively determine and reject SCE&G's unsubstantiated, shotgun claims of privilege and confidentiality we request that SCE&G be ordered to provide a detailed identification and description of the documents claimed to be privileged or confidential in the form of a confidential document log and 'privilege log,' adequate to allow us and the Commission to assess the applicability of the privilege or claim of confidentiality; and, then, to examine such documents, in camera, to review and determine whether such documents, if privileged or legitimately confidential, should be produced in full or in redacted form as essential to the determination of the issues in this proceeding and, otherwise, unavailable to Complainants. Finally, Friends of the Earth and Sierra Club

request that the Commission order SCE&G to permit them and their agents, at times and in a manner to be agreed upon, to enter the subject facility for purposes of inspection, measuring, surveying, photographing, testing, or sampling as authorized by discovery rules, but previously objected to and now unaddressed by the Company in its latest Response.

Of the twelve (12) specific document production request made in Complainants' Third Interrogatories, Document Production Requests and Request for Entry (hereafter Third Discovery), served March 15, 2018, seven (7) expressly reference documents previously produced by Respondent in discovery, specifically quoting terms and titles from SCE&G's own documents. Nevertheless, Respondent absurdly interposes boilerplate "vague" and "overbroad" objections, insists that such documents are "not within SCE&G's possession, custody, or control" and refuses any document production whatever.

Request for production No. 1 seeks documents related to the monthly "Project Review Meeting Minutes – V.C. Summer Units 2 and 3." Such monthly project meeting minutes were identified in previous discovery document production, identified by SCE&G with their Bates page numbers beginning FOE0065970. Request No. 2 seeks documents relating to "High Bridge Reviews" or "High Bridge Reports," as referred to in a previously produced document, beginning FOE0067020, apparently related to estimates to complete the subject new nuclear project and the role of "WECTEC." Request No. 3 seeks documents relating to a so-called "Prism reports" – including "V.C. Summer Cost Performance Report – March 2017," referred to in the discovery document beginning page FOE0067020, including an "Estimate to Complete" and a document referred to as :

"VC Summer Cost Performance Report – March 2017." Request No. 4 seeks documents relating to the "VC Summer Project Risk Management Risk Mitigation Plans, 1/20/2016," referred to in discovery beginning page FOE0066743. That document is entitled, "Agenda: VC Summer Project Risk Management Meeting," is dated December 7, 2016, and includes a Table of Contents listing some 30 identified topics. Request No. 5 seeks documents related to "CAR 2014-1961 Root Cause Report, December 16, 2014," which is referred to in document beginning page number FOE004280, which appears to refer to a significant nuclear project construction quality nonconformance requiring a major root cause and corrective action evaluation and response. Request No. 6 seeks documents relating to so-called "Tiger-Team reports," for December 2016, referred to in discovery document beginning page FOE0066670, regarding nuclear project design changes and other issues and including a slide entitled, "AP1000 Design Change Tiger Team." Request No. 9 seeks documents relating to "Projected Revenue Rate Increases" and "Revenue Update, November 2016," referred to in a discovery document beginning FOE0044286, purporting to project rate increases expected to be driven by completion instead of abandonment of the new nuclear project. The Commission should reject Respondent's spurious and improper objections to production of these documents specifically identified in the Company's own records.

Document Production Requests No.s 7, 8, 10, 11 and 12 seek clearly discoverable records which are material to the determination of claims and defenses in this and the other related consolidated proceedings. Nevertheless, as with the other requests, SCE&G has asserted categorical objections and unwarranted conditions to any responsive production. Fully responsive and unconditional production of these materials

showed by compelled.

For the first time in its discovery responses in this proceeding, SCE&G now insists that it will no longer provide any otherwise responsive documents sought by Complainant "unless and until the parties enter into a confidentiality agreement," Response to Request No.1, et al., knowing full well, based on past practice and specific express representations by counsel, that such a confidentiality agreement is unacceptable and objectionable to Complainants as a matter of principle and practice. In response to previous document discovery in this proceeding SCE&G has provided numerous documents expressly denominated "confidential," notwithstanding Complainants' refusal to sign a confidentiality agreement and with full awareness that Complainants assert the unrestricted right to freely communicate the content of such documents to its members, public officials, journalists and interested members of the public. The prudence of SCE&G's management and subsequent abandonment of this new nuclear project, as well as the asserted ratepayer responsibility for the costs of that abandoned project are all matters of great public interest and vigorous on-going debate. FOE and Sierra Club insist that withholding such significant information, bearing on the costs and prudence of this failed project, would be unwarranted, improper and directly contrary to the public interest. In any event, the proper burden of withholding any relevant information from Complainants and the public must be borne by SCE&G; and only then, when and if any legitimate interest in confidentiality is demonstrated, then only where such withholding as is most narrowly tailored in favor of disclosure.

In response to each and every request, SCE&G asserted general and specific,

but boilerplate, objections, which must be rejected.

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Rule 26(b), SC Rules of Civil Procedure.

The attorney work product doctrine shields documents from production in discovery under limited circumstances.

The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party. See Rule 26(b)(3), SCRCP; *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Generally, in determining whether a document has been prepared "in anticipation of litigation," most courts look to whether or not the document was prepared because of the prospect of litigation. See *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir.1992) (document "must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim," as contrasted to "materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes."); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir.2004) (document "should be deemed 'in anticipation of litigation' ... if ... [it] can be fairly said to have been prepared or obtained because of the prospect of litigation." (citation omitted)); *In re Kaiser Aluminum & Chemical Co.*, 214 F.3d 586, 593 (5th Cir.2000) (primary motivation behind creating the document must be to aid in possible future litigation).

Tobaccoville USA v. McMaster, 387 S.C. 287, 692 S.E.2d 526 (SC 2010).

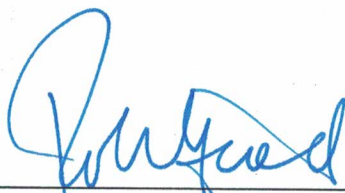
Upon objection to the assertion of a privilege to withhold documents based on attorney - client privilege or the work product doctrine, the proper course is to require the production of a 'privilege log' detailing the documents involved and the submission

of such claimed protected documents for in camera review by the Commission or Hearing Officer for determination. Stokes-Craven Ford v. Scott L. Robinson and Johnson McKenzie & Robinson, LLC, .. Slip Op. At p. 15 (SC September 9, 2015).

WHEREFORE, the Complainants, Friends of the Earth and Sierra Club, hereby move the Commission for an order compelling South Carolina Electric & Gas Co. to fully respond, without further delay, to all outstanding discovery requests sought by Complainants by providing all responsive documents and other records as specifically requested, organized in a reasonably accessible format and properly indexed to the specific subject document request. We further request that the Commission order SCE&G to permit them and their agents, at times and in a manner to be agreed upon, to enter the subject facility for purposes of inspection, measuring, surveying, photographing, testing, or sampling .as authorized by discovery rules, but refused by the Company.

Respectfully submitted,

April 10, 2018



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ATTORNEY FOR COMPLAINANTS / PETITIONERS
FRIENDS OF THE EARTH AND SIERRA CLUB

Exhibit 1

Defendant/Respondent's Responses and Objections to Complainants' Third Interrogatories, Document Production Requests and Request for Entry